EXPRESS MAIL EL874283685US

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

APPEAL BRIEF

Name of Applicant / Appellant:	Saffron Technology, Inc.
Serial Number of Application:	76/141657
Filing Date of Application:	October 5, 2000
Mark:	SAFFRON TECHNOLOGY (and design)

PROSECUTION HISTORY

Applicant filed an application to register the "SAFFRON TECHNOLOGY (and design)" logo mark on October 5, 2000 for use in association with "computer software, namely, intelligent data agents for sorting, organizing, managing, storing and retrieving information." In an Office Action mailed March 23, 2001, the Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act in light of U.S. Registration No. 2188744. Applicant traversed the rejection based on the differences in the marks, the identification of goods the relevant channels of trade, and the sophistication of the purchasers of such goods. The Trademark Examining Attorney, in a second Office Action mailed December 17, 2001, made final the refusal to register Applicant's mark under Section 2(d) of the Trademark Act. Applicant subsequently timely filed a Notice of Appeal on June 13, 2002. Applicant - Appellant hereby respectfully appeals the refusal of the Trademark Examining Attorney to the Trademark Trial and Appeal Board.

REMARKS

Appellant's SAFFRON TECHNOLOGY (and design) software is designed to be integrated into the software systems of its customers, used as middleware, or is customized by the Appellant for its customers' specific applications. It is not sold as, nor can it be used as, a standalone software application for manipulating data or information, or to produce web pages or reports. Appellant's software is licensed under a developer's license and is often provided with development services. Such developer's licenses cost seventy-five thousand dollars ($75,000) per license. Accordingly, the SAFFRON TECHNOLOGY (and design) software is marketed to chief technology officers, senior software development managers, and other sophisticated users of database analysis software products. Such individuals are professionals with expertise in the design of complex computer software systems and programs, and understand the unique requirements of the highly specialized field of intelligent data agents, artificial intelligence principles, and the associative memory techniques that Appellant's software employs for enhancing the analysis and manipulation of large volumes of computer data in near-real time. Appellant's software neither summarizes data nor produces reports.

The Trademark Examining Attorney refused registration of Appellant's mark under Section 2(d) of the Trademark Act in light of U.S. Registration No. 2188744 for the mark SAFFRON. The SAFFRON mark, as registered, is associated with "computer software for developing reports and summaries of the information contained in computer databases and files and for making those reports and summaries accessible via local and global computer networks." The USPTO file wrapper for Reg. No. 2188744 indicates that the identification of goods as originally filed was directed to enable users to "design reports based on commercial databases and

flat files and then run them to be viewed on the Internet...via generation of HTML code..." Accordingly, it appears that this identification of goods is narrower than the identification of goods as registered. The file wrapper provides no specimens of use nor any other information as to the nature of the goods to which the SAFFRON mark is applied. In can be surmised, however, that such software is used to produce HTML-based web pages that display data contained in old legacy hierarchical databases or flat files. Application software such as that associated with SAFFRON can reasonably be expected to be used in a stand-alone fashion without integration or customization. Registrant's appeal brief filed on January 16, 1998 confirms the stand-alone nature of the SAFFRON software. (Page 5, line 24).

The relevant factors to a determination of likelihood of confusion were set forth by the Court of Customs and Patent Appeals. *In re E.I. du Pont de Nemours & Co.,* 476 F2d 1357, 177 USPQ 563 (C.C.P.A. 1973). The relevant factors in the instant case are discussed below.

OVERALL COMMERCIAL IMPRESSION

The Trademark Examining Attorney has noted that the marks at issue in the instant case create the same commercial impression because of the common usage of SAFFRON. The word saffron is commonly used to refer to the plant *crocus sativus,* as well as to the rare and expensive spice produced from the dried stigma of the plant. The most notable characteristics of the spice saffron are the unique flavor imparted to food as well as the seemingly insignificant quantity (grams) required to accomplish the desired effect in food preparation. Saffron is also used to describe the color that the spice imparts to food when used in recipes. Appellant's mark juxtaposes the common terms SAFFRON and TECHNOLOGY, in combination with design

elements, to create the overall commercial impression that a small quantity of Appellant's proprietary software product goes a long way towards solving the needs of its customers. The Trademark Examining Attorney has indicated that Appellant's mark creates the same overall impression as the cited registered mark because of the common usage of the word SAFFRON. However, the fundamental rule remains that marks cannot be dissected and must be considered in their entireties. *Massey Junior College, Inc. v. Fashion Institute of Technology,* 492 F.2d 1399, 181 U.S.P.Q. 272 (C.C.P.A. 1974). In addition, the term TECHNOLOGY is not merely descriptive or subordinate matter that is not retained in the minds of the relevant consumer, but serves to suggest that Appellant's goods are not related to the common meaning of the word SAFFRON without describing an attribute of its software products. In addition, Appellant's logo mark incorporates several design elements that create a composite mark that further distinguishes the mark and contributes to the overall commercial impression. The fact that Appellant's mark and the earlier registered mark share a common root does not automatically mean that there is likely to be confusion with respect to the marks or the source of the associated products or services, even if such goods or services are related or move in the same channels of trade. *See, e.g., Colgate-Palmolive v. Carter-Wallace, Inc.,* 432 F.2d 1400, 167 U.S.P.Q. 529 (C.C.P.A. 1970) ("PEAK PERIOD" and "PEAK"). As stated above, Appellant's composite mark creates a different overall commercial impression from that of Registrant's mark.

Thus, while there are obvious similarities between the word portions of the marks, there are also significant differences sufficient to overcome a likelihood of confusion based on the overall commercial impression of the marks themselves.

RELATEDNESS OF THE GOODS

The Trademark Examining Attorney has noted that the goods of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. The Trademark Examining Attorney must provide evidence showing that the goods and services are related to support a finding of likelihood of confusion. TMEP Section 1207.01(a)(vi). In the instant case, the Trademark Examining Attorney has concluded that the commonality between the goods of the parties is found in the fact that both goods comprise software that act on *information* (emphasis added). This conclusion is simply too broad and suggests the standard of the per se rule previously overruled by the TTAB in regard to computers generally.

> It is important to note that, in order to support a holding of likelihood of confusion, there must be some similarity between the goods and services at issue herein beyond the fact that each involves the use of computers. In view of the fact that computers are useful and/or are used in almost every facet of the world of business, commerce, medicine, law, etc., it is obvious that distinctions must be made. Reynolds and Reynolds v. I.E. Systems *5 U.S.P.Q. 2d 1749 (TTAB 1987).*

Appellant's goods are narrowly drawn to specific, sophisticated software that embodies artificial intelligence attributes (intelligent data agents) that mimic human learning and decision-making processes by creating dynamic associations between data elements. Such dynamic associations, or associative memory attributes, allow Appellant's software to retain such associations even when the structure of the database is modified. Appellant's highly complex

software algorithms and routines are customized by Appellant and integrated into the third-party software of Appellant's consumers in order to impart human-like decision-making capabilities to such third-party software.

As set forth in the cited Registrant's appeal brief filed on January 16, 1998, the Registrant's software "utilizes HTML and Java computer languages to create interactive (web) pages accessible via computer networks and the World Wide Web." (Page 1, lines 12-13). Registrant's software can therefore be reasonably described as web page authoring tools and database query tools for use in summarizing data and producing reports that are displayed on a computer as web pages. In contrast, Appellant's software neither summarizes data nor produces the reports that Registrant's goods produce.

Accordingly, Appellant respectfully submits that under the standards of the TTAB, the software goods offered by Appellant in association with the SAFFRON TECHNOLOGY (and design) logo mark are not similar to the software goods offered by the cited Registrant.

ESTABLISHED CHANNELS OF TRADE

The appeal brief filed by Registrant on January 16, 1998 notes that the SAFFRON software is marketed to users in highly specific and sophisticated markets. The Registrant further stipulated that the SAFFRON software is "sold on a retail basis directly to end-users as a stand-alone product," and "is not sold bundled with other software and not sold as a pre-integrated component of a computer." (Page 5, lines 22-24). An affidavit filed in support of that appeal brief further stipulated, *inter alia*, that (i) the software is not mass-marketed through major retail chains; (ii) the software is marketed in a highly targeted fashion to sophisticated end-users such as AT&T,

Bellcore, Chase Manhattan Bank, Hewlett-Packard, and New York Life. The file wrapper is otherwise silent as to specimens of use and channels of trade. In can be concluded from Registrant's appeal brief that the marketing channel is small and the customers are few and well known to the Registrant.

Appellant markets its software goods to its customers in a highly targeted fashion through Appellant's direct sales force. Applicant's specialized SAFFRON TECHNOLOGY (and design) software products are integrated into the software of its customers computer systems and/or customized for each unique application. Appellant's customers are federal government agencies and pharmaceutical research companies that generate vast quantities of data that must be analyzed in near-real time, and in which the associations between data elements should be maintained regardless of the change in the structure or size of the database. Accordingly, the marketing channel for Appellant's goods is also small and the customers are well known to Appellant, but there is no intersection between the respective customer sets of Appellant and Registrant.

Accordingly, although similar, the channels of trade through which the Appellant's goods and the Registrant's goods move do not overlap.

SOPHISTICATION OF PURCHASERS

The appeal brief filed by Registrant on January 16, 1998 notes that the prospective purchaser of SAFFRON software is an "educated computer professional responsible for managing information available through intranets and/or the Internet." Such educated and highly sophisticated purchasers are very knowledgeable about the sources of the software products they procure.

The prospective purchasers of Appellant's goods are senior-level professionals with expertise in the design and acquisition of complex computer software systems and programs, and understand the unique requirements of the highly specialized fields of large database management and analysis, and intelligent data agents and artificial intelligence. Due to the sophistication of Appellant's software and its significant license fee, the targeted purchaser of Appellant's software is a chief technology officer, a chief information officer, or other senior, highly experienced subject matter expert. Such prospective purchasers demand significant additional information from Appellant regarding the nature and capability of the goods, and would demand to test the goods prior to any purchase commitment. The purchase of Appellant's specialized software products by its prospective purchasers involves significant research and evaluation on the part of such purchasers, as well as a substantial monetary investment in the implementation and integration of Applicant's software goods into the software of such purchasers' software systems.

Therefore, the consumers of both Registrant's and Appellant's goods can be expected to perform a great deal of research, evaluation and testing prior to purchasing the software from the respective parties, and would therefore not be confused as to the source of such goods.

CONCLUSION

In summary, an analysis of the facts in the instant case reveals that:

1. The marks themselves each create a different overall commercial impression;
2. The goods are distinguishable and not at all similar;
3. The channels of trade in which the goods move are similar but are distinct from one another; and

4. The customers of each party are different, are equally sophisticated, and are not likely to be confused as to the source of either party's software goods.

Appellant respectfully submits that for the reasons set forth above, Appellant's appeal should be granted favorable treatment and its application for the SAFFRON TECHNOLGY (and design logo mark should be passed to publication.

Respectfully submitted,

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Date: August 9, 2002

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08-09-2002
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #77

August 9, 2002

VIA EXPRESS MAIL NO. EL874283685US
Commissioner of Trademarks
BOX: TTAB
2900 Crystal Drive
Arlington, Virginia 22202-3513

Dear Commissioner:

Re: Proceeding No. 76141657; Appeal Brief

Enclosed please find the following:

1. Appeal Brief of Saffron Technology, Inc., from the Office Action dated December 17, 2001, for the mark "SAFFRON TECHNOLOGY (and design)", Trademark Application, 76/141657;

2. A self-addressed, postage-prepaid postcard. Please stamp the postcard with the filing date and return it to the address indicated.

If there are any questions regarding the enclosed, please contact the undersigned.

Respectfully submitted,

Neal B. Wolgin
Attorney for Applicant

CERTIFICATE UNDER 37 C.F.R. §1.8(a)
CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail postage prepaid in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on August 9, 2002.

Kim Hollister
August 9, 2002

Enclosures
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